



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.E032 OF 2019

P. M. GACHIE T/A REGENT AUCTIONEERS.....APPLICANT

PETER MATHENGE GITONGA T/A

MATHENGE GITONGA & CO. ADVOCATES.....PLAINTIFF

V E R S U S

NJOROGE KIBATIA & SIMON MAINA KARUGA T/A

KIBATIA & COMPANY ADVOCATES.....DEFENDANTS

RULING

(1) Before this Court is the Chamber Summons dated **13th September 2019** in which **P.M. GACHIE T/A REGENT ACUTIONEERS** the Applicant seek the following orders:-

- “1) THAT this Honourable Court hereby grants leave for extension of time for filing of his Reference.**
- 2) THAT in the interest of the overriding objective principle, upon grant of prayer 1 above this Reference be deemed to have been filed within time.**
- 3) THAT the decision of the taxing master in this matter in the Auctioneers Bill of Costs between the Applicant and the Respondent made on the 17th July, 2019 be reviewed in terms of item number 3 and 4 of the said Bill of Costs and be allowed at Kshs. 6,896,419/- and Kshs. 20,000/- respectively.**
- 4) THAT the Court do grant leave to the Applicant to adduce additional supporting documents to the Bill as attached in the Chamber Summons Application.**
- 5) THAT the costs of the Application be provided for.”**

(2) The Respondent opposed the Application by way of the Replying Affidavit dated **12th November 2019** sworn by **MOSES MAINA KARUGA** a Partner in the firm of **Kibatia and Company Advocates**, the Respondent herein.

BACKGROUND

(3) The Plaintiff herein instructed **P.M. Gachie T/A REGIONAL AUCTIONEERS** (the Applicant herein) to execute Warrants of Attachment of moveable property in execution of a money decree in **Civil Case No. 413 of 2017**. The Applicant honoured the Warrants of Attachment and proceeded on **13th February 2019** and on **18th February 2019** to proclaim the Respondents assets to the tune of **Kshs. 1,865,300.00**.

(4) Thereafter the Applicant and the Defendant failed to agree on the fees due to the Auctioneer. The Auctioneer filed a Bill of Costs which was taxed at **Kshs. 89,675.00** on the basis of the value of the goods which had been proclaimed. Being aggrieved by the decision of the Taxing Master the Applicant filed the present application.

(5) The Summons was canvassed by way of written submissions. The Applicant filed its written submissions on **6th February 2020**. The

Defendant/Respondent filed their written submissions dated **21st April 2020**.

BACKGROUND

(6) The Applicant herein filed their Bill of Costs dated **12th March 2019**. The same was taxed by **Hon. S. Opande** at **Kshs. 89,675.00**. The Applicant being aggrieved by the Ruling of the Hon. Taxing Master now seeks for an extension of time within which to file a Reference against said Ruling and further seeks a review of the decision of the Taxing Master in respect of items **3** and **4** of the Bill of Costs.

ANALYSIS AND DETERMINATION

(7) I have carefully considered the Affidavits placed before this Court as well as the submissions filed by both parties. The Applicant has prayed for an extension of time within which to file an appeal against the finding of the Taxing Master delivered on **17th July 2019**. It is submitted that the delay in filing this reference was occasioned by the failure by the Taxing master to supply the reasons for this decision on the Bill of Costs and due to the unavailability of the Court file. The Applicant states that they were compelled to lodge a complaint regarding the missing file. The letter dated **11th July 2019** raising complaint about the missing Court file is annexed at **page 4** of the Chamber Summons dated **13th September 2019**. The Defendant/Respondent in their submissions dated **21st April 2020** indicates that they do not object to the grant of prayers (1) and (2) of the Chamber Summons. There being no objection I do grant prayer (1) for an extension of time within which to file the Reference and I also grant prayer (2), that the present Reference be deemed as properly filed. Accordingly the following two issues remain for determination:-

(i) Whether the Applicants prayer to adduce additional evidence should be granted.

(ii) Whether the present Reference should be allowed.

(i) ADDITIONAL EVIDENCE

(8) By prayer (4) of the Summons the Applicant seeks leave to adduce additional documents in support of this Reference. The documents which the Applicant seeks to introduce as additional evidence are:-

(a) The Proclamation of Attachment dated 18th February 2019.

(b) A Certificate of Title (“the Title”) of New Age Developers & Construction Company Limited in respect of Land Reference 11486/242.

(c) Proclamation of Attachment dated 13th February 2019.

(d) Warrants of Attachment of Movable Property in execution of decree for money.

(e) Warrant of sale of property in execution of decree for money.

(f) The application for execution.”

(9) With respect to the Proclamation Notices, these were adduced as evidence before the Taxing Master and cannot now be considered additional evidence. With respect to the Title deed the same would not be relevant as the execution undertaken involved only moveable property. The Title Deed relates to Immoveable property which the Auctioneer was not at liberty to proclaim. It would therefore serve no purpose to admit the said Title Deed.

(10) Lastly given that Taxation has already taken place and that the Taxing Officer has already delivered a Ruling on the same, the prayer to adduce additional evidence has come too late in the day. This is an application which ought to properly to have been made before the Taxing Officer.

(11) In the case of **VIJAY KUMAR DAVALJI KANJI GOHIL –VS- SURESH MOHANLAL FATANIA & 8 OTHERS [2016]eKLR**, the Court held as follows:-

“... If the taxation were to be contrasted with a trial, the valuation report would have been an exhibit which was never admitted in evidence. It would be the equivalent of a piece of evidence which the advocate for the plaintiff sought to place on record after the case had been closed.

Evidence in a case is either admitted or rejected during the trial or prior to the commencement of the trial. Parties can, during pre-trial procedures or during Case Management Conferences agree on the evidence to be admitted in evidence.

But once the witnesses have all testified, it would not be open to the advocates, during submissions, to introduce new evidence.

In similar vein, the advocates for the defendants in this case were out of order, by seeking to introduce the valuation report in evidence, after the taxation process had been undertaken by the Taxing Officer.

I find that the Taxing Officer was right to have excluded the valuation report from consideration, when determining the Instruction Fees” [own emphasis]

In the same vein I decline to allow prayer (4) of this application seeking to adduce additional evidence.

Merit of the Reference

(12) It is trite law that Taxation of Costs is an exercise which is based on the discretion of the Taxing Officer. As a general rule the High Court ought to be slow to interfere in the decision of a Taxing Officer unless it can be shown that there was an error in law or in principle in reaching said decision. In **FIRST AMERICAN BANK OF KENYA –VS- SHAH & OTHERS [2002]EALR Hon. Justice Ringera** (as he then was) stated that-

“First I find that on the authorities, this Court cannot interfere with the Taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle.”

(13) The Applicant has challenged the Awards made by the Taxing Officer in regard to item **Nos. 3 and 4** of the Bill of Costs dated **12th March 2019**. Item **No.3** of the Bill of Costs was for ‘**Commission**’. The Applicant submits that the Deputy Registrar erred as he gave no sufficient reasons for rejecting an amount of **Kshs. 6,896,419.00** as Commission under item **No. 3**.

(14) The Respondent on the other hand submits that the Applicants claim for **Kshs. 6,896,419.00** is not sustainable. That an Auctioneer only receives instructions in respect of the particular attachment which was duly executed. The Respondent submits that in his Ruling the Taxing Master did provide the basis for awarding **Kshs. 72,306** being the value of the proclaimed goods. The Applicants submitted that the Auctioneer should only be remunerated for work done and **not** on the basis of work yet to be done. That the Auctioneers charges for attachment should be based on the value of the goods attached **not** on the decretal sum.

(15) **Rule 55** of the **Auctioneers Act** provide as follows:-

“Rule 55 Fees and disbursements payable to an auctioneer

(1) Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.

(2) Where a dispute arises as to the amount of fees payable to an auctioneer—

(a) in proceedings before the High Court; or

(b) where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the Civil Procedure Rules (Cap. 21, Sub. Leg.), may on the application of any party to the dispute assess the fee payable.

(3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.

(4) An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.

(5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.”

(16) In his Ruling of the Taxing Officer taxed item **No. 3** as follows:-

“1st 100,000 – 105 – 10,000

Next 899,999 – 5% - 17,306

TOTAL - 72,306

(17) In the case of **NATIONAL INDUSTRIAL CREDIT BANK LIMITED –VS- S. K. NDEGWA AUCTIONEER, CIVIL APPEAL NO. 195 OF 2004**, the Court of Appeal made the following pronouncement:-

“The object of paragraph 4 is clear.

It is intended to provide values on the basis of which the auctioneer’s charges should be assessed. We think that it is reasonable that the auctioneer’s charges for attachment should be based on the value of the goods attached and not on the

decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum.”

(18) The above is a decision of the Court of Appeal which binds all lower Courts. The Commission of an Auctioneer is to be based upon the **value** of goods attached and **not** on the decretal sum. Accordingly I find no error on the part of the Taxing Master in Taxing Item No. 3 on the basis of the **value** of the proclaimed property.

(19) With respect to **item No. 4** being Disbursements the Taxing officer disallowed the Clause on disbursement on the basis that no evidence was adduced in support of the same. I am in agreement that in the absence of relevant documentation to support the claim on disbursements the Taxing officer was right to disallow that claim. The Applicants prayer to be granted leave to file the documents and to be awarded **Kshs. 20,000/-** for **item No. 4** cannot be allowed at this stage. Again I find no evidence of an error on the part of the Taxing Officer.

(20) Finally I find no merit in this Reference. The same is dismissed and costs are awarded to the Defendant/Respondent.

Dated in Nairobi this 12TH day of FEBRUARY, 2021.

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MAUREEN A. ODERO

JUDGE